

Open Courts:
Protection Against, or Invitation to
Abuses of Justice?

Murray Lundberg

Criminology 135
Bruce Willis
Yukon College
April 13, 1994

The custom of allowing public access to court proceedings in Canada under most circumstances is based on the British common law traditions which served as the models for much of our legal system. Public access is generally believed to protect society against the abuses which can, and have occurred when the courts are allowed to function in secrecy. Controversy and litigation continues, however, on whether or not injustice to certain classes of people is sometimes fostered by complete openness, and there is no consensus as to the appropriateness of the restrictions on access currently employed by the courts. In this regard, interpretation of the *Charter of Rights and Freedoms*, generally sections 1 and 2, has become the determinant in many cases. In order to limit the complexity of the issues involved, this paper will limit its focus to the issue of public and media access to criminal trials where possible.

The Law Reform Commission of Canada (LRC) (1987) argues that openness is a necessary characteristic of all facets of a truly democratic system of government, including the justice system: "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" (LRC, 1987:5). In ideal terms, the individual members of society should have no limits on the information which is available to them, since "better ideas" are created when they are exposed to different opinions; in our modern society, the various media obviously play an important part in making such opinions

accessible to large numbers of people.

In this liberal view of democracy, it follows that there should also be very limited restrictions on certain freedoms, as set out in sections 1 and 2 of the *Charter*:

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.

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.

The benefits of open courts can be described in different ways; the Law Reform Commission (1987:16-17) delineates two kinds of fundamental benefits of this system;

the improvements to society that result from freedom to discuss and form opinions about ...the legal system; and, the improvements in the administration of justice that result from scrutiny of those involved in it and from increased public knowledge of the laws to which it is subject.

Alan Mewett (1988:28) sees the presence of the public as:

...protecting the accused in many ways. It prevents, or at least minimizes, the arbitrary abuse of power by state officials such as judges, prosecutors and police; it opens the testimony of witnesses to public scrutiny and this, in effect, is a check on perjury; [and] it ensures that the accused's rights are protected.

Weighed against the values of those benefits are issues alluded to in s.1 of the *Charter*, such as the right to privacy to protect individual reputations and dignity, the desire for effective law enforcement, and the right to a fair trial. The LRC

notes (1987:19) that, though any harm which might be done by restricting openness is abstract and difficult to measure, the harm done by violation of these rights is generally easy to recognize and assess.

Dr. Max Wyman, a member of a commission studying the lower courts in Alberta in 1975, expressed misgivings that the open court system may destroy more lives than it saves:

[I]f the presumption of innocence is to mean anything in our system of law, the privacy of people should be guarded up to, and until, an actual conviction takes place. Does the public really have a right to know that people have been accused of crimes even when adjudication later deems them to be innocent of those crimes? I think not (quoted in Gall, 1990:129).

The right to privacy is particularly important to victims of, and witnesses to crime, and to those who are not directly connected with the crime, such as the accused's family or "those who have their property searched for contraband" (LRC, 1987:18). The Alberta Council on Aging has objected to printing the names, ages, and addresses of seniors who have been victims of crime, calling such publication "a form of persecution and a violation of human rights" (quoted in Gall, 1990:134). However, the LRC (1987:18) argues that "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".

The right to a fair trial, "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"

(LRC,1987:18), can be jeopardized primarily by the media, by influencing potential jurors. This is a common rationale behind the various types of publication bans which have been the subject of so much litigation. As well as such "gag orders", the court has several other options available to it to limit the media's effect; jurors may be sequestered, the case may be moved, or it may be adjourned until media attention has dissipated, although delays are limited to some extent by section 11(b) of the *Charter* (LRC, 1987:30-31). However, arguing for the media's side, Don Sawatsky (1994) says that, "if the jury system, which has been the backbone of the judicial system since before the year one, works so poorly, then Canada had better come up with a better solution".

Subsection 442(1) of the *Criminal Code* allows the presiding judge to close the court when he feels it is "in the interest of public morals, the maintenance of order or the proper administration of justice ...". Citing the publication bans used in recent Canadian cases such as Homolka/Teale and Martinsville, Sawatsky (1994) calls such arguments "used to 'protect' the great unwashed and arguably the defendants, ...nothing more than insulting and elitist".

The LRC seems to agree with that view generally; their recommendations for changes call for removal of both the "public morals" and "proper administration of justice" criteria. They state (1987:82) that "we must be particularly cautious not to intrude upon the concept of openness simply because the

information that might be publicly exposed is shocking", and also quote from *R. v. Warawuk* ([1978], 42 C.C.C. [2d] 121 [Alta.C.A.]) to indicate that "it cannot but be in the interest of public morals to have it known publicly that such offences are prosecuted and brought to trial".

The degree of access which the media should have to evidence at a trial has been the subject of conflicting court decisions in recent years. Mewett (1988:29) argues that "the right of the public to be present at a trial, is not the same as the right of all members of the public to see edited versions of what goes on in the courtroom in newspapers or to see it on television". In *R. v. Thomson Newspapers* (11 W.C.B. 436 [1983][Ont.H.C.]), the decision held that the public and media are entitled to attend proceedings as spectators only, and do not have the right to access to evidence for copying or filming. However, the decision in *R. v. Priemski* ([1986][Ont.H.C.]), ruled that in order to give television equal standing to the print media, they should be given the right to broadcast a videotaped murder confession.

Gall (1990:136) points out that, in Canadian courts, "an atmosphere of dignity and decorum is regarded as best suited to the search for truth and, ultimately, the attainment of justice", and that the presence of the media, particularly television, in a courtroom could detract from that dignity and decorum, and promote sensationalism. However, the LRC (1987:90) argues that with current technology, audio and video recording can be unobtrusive. Also, it could be argued that the presence of

television would enhance and expand both the deterrence effect of the criminal justice system, and what Gall (1990:137), paraphrasing Lamer J., calls a secondary function of the courts, "the provision of a forum for the dramatic reaffirmation of transgressed societal values".

Victims of sexual offences may have their privacy protected from media exposure by subsection 442(3) of the *Criminal Code*, for two primary reasons:

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 (LRC,1987:34).

This protection is no longer mandatory, but must be requested by the plaintiff or prosecutor. In *Canadian Newspapers Co. v. A.G. Canada* ([1985], 49 O.R. [rd] 557 [C.A.]), the Court ruled that in cases such as those where a complainant has made false allegations in the past, publication of her name may be desirable, as it "may encourage witnesses with helpful information to come forward" (LRC,1987:34). While the court may be closed during a *voir dire* to determine the admissibility of the complainant's sexual history, the court must be open during the trial, "unless there is clear evidence that persons in the courtroom are intimidating the witness" (LRC,1987:35).

Using the *Charter's* guarantee of equality in section 15(1) as a basis, the courts have recently allowed, as in *R. v. R.* ([1986], 28 C.C.C. [3d] 188 [Ont.H.C.]), a similar ban on

publication of the name of the accused in a sexual offence until he is convicted; if he is acquitted, the publication ban is permanent.

The need to allow for effective law enforcement has led to the courts allowing, from the basis of common law tradition, the protection of the identity of confidential police informers; similar considerations allow for the protection of the identities of inmates testifying against other inmates, and complainants in blackmail cases. These protections are normally only afforded individuals who may be in physical danger, not those who may simply be embarrassed by publicity (LRC,1987:35).

Young people are given special protection from publicity by section 39 of the *Young Offenders Act*. This section not only gives a wide range of specific justifications for closing the court, subsection 39(1)(b) allows the court to exclude any person whose presence is "unnecessary to the conduct of the proceedings". This is a softened version of section 12(1) of the *Juvenile Delinquents Act* which stated that juvenile court proceedings must be closed to the public. Though overly broad statutes have often been overturned in *Charter* cases,

in *Re Southam Inc. and R.*, 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 (LRC,1987:38).

Currently there is, and likely perpetually will be, disagreement as to whether the restrictions on open courts which are currently used are overly restrictive, or too generous.

Perhaps that is an indication that the current system is at least close to the one which will achieve the desired balance between protection of all parties involved in a court action from abuse by the state or by the publicity, and the public's right to know what is occurring in the country, including in the court system.

85

Bibliography

Gall, Gerald L. The Canadian Legal System. Third Edition.
Toronto: Carswell. 1990.

Law Reform Commission of Canada. Working Paper 56: Public and Media Access to the Criminal Process. Ottawa: Law Reform Commission. 1987.

Mewett, Alan W. An Introduction to the Criminal Process in Canada. Toronto: Carswell. 1988.

Sawatsky, Don. January 28, 1994. Arguments are insulting and elitist. Yukon News.