Access to Court Information[1]

[With Particular Reference to PEI]

BY

Gerard E. Mitchell

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Open Courts

Courts are public institutions and what takes place in them is public business. Everyone has the right to attend court proceedings but members of the public more often rely on the media to inform them about what goes on there. It is the media that gives effect to the principle of openness. That is why the media has the right, now guaranteed by s. 2(b) of the *Charter*, to gather news from and report on judicial proceedings. This includes the right to access and disseminate information in court documents. The following is a digest of the law about access to court information in Canada with some particular reference to Prince Edward Island.

The Principle of Openness

Openness has long been recognized as a cornerstone of the common law and a basic principle of Canadian judicial proceedings. Public access guarantees the integrity of judicial processes by demonstrating that justice is administered in an non-arbitrary manner and in accordance with the rule of law. Writing for the majority of the Supreme Court of Canada in ***Re Vancouver Sun***, 2004 SCC 43, Justices Iacobucci and Arbour said at para. 25:

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

In ***Nova Scotia (Attorney General) v. MacIntyre***, [1982] 1 S.C.R. 175, a pre-*Charter* case involving journalistic access to search warrants, Dickson J. cites from Halsbury's Laws of England, 4th ed., vol. 10, para.705 which states the general rule in these terms:

> In general all cases, both civil and criminal must be heard in open court, but in certain exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit in camera.

Public accessibility is an important ingredient of judicial accountability. The philosophy behind the general rule of openness is contained in a quote from the social utilitarian Bentham referred to by Dickson J. in ***MacIntyre*** at p.183. In that quote Bentham states:

> 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. 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.

The importance of the openness principle is attested to by Dickson J. who, writing for the majority in ***MacIntyre***, said at p.186:

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect values of **superordinate** importance. (Emphasis added)

The general principle of openness is given statutory expression in Prince Edward Island in s. 57 of the ***Supreme Court Act*** R.S.P.E.I. 1988 Cap. S-10 which provides as follows:

> (1) Except where otherwise enacted and subject to subsection (2) and the Rules, all court hearings shall be open to the public.

In the criminal law context the general principle of openness is stated in the opening phrase of s.-s. 486(1) of the ***Criminal Code***. Subsection 486(1) states:

> **Any proceeding 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. (Emphasis added)

Openness and Court Documents

The open court principle or the "open information" principle as University of Ottawa Professor David Paciocco would prefer, is not just about the right to attend proceedings. It is really about access to information that is relevant to the resolution of court proceedings. Accordingly, not only are the judicial proceeding themselves public but so too, for the most part, are the documents that are part of them. In ***Edmonton Journal v. Alberta***, [1989] 2 S.C.R. 1326, a case involving a challenge to the constitutionality of provincial legislation prohibiting publication of the details of civil proceedings, Cory J. said at p. 1340:

> It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents.

The principle of document accessibility finds statutory expression in s.58 of the P.E.I. ***Supreme Court Act*** which provides as follows:

> (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless

> an Act or an order of the court provides otherwise.
>
> (2) For purposes of confidentiality, a judge may order that any document filed in a civil proceeding in a court be sealed and not form part of the public record.

At present there is no fee prescribed for the examination of court documents on P.E.I. Thus, absent a statutory provision or a court or judge's order prohibiting or limiting access, any document filed in a civil proceeding is by law available for examination by the press or a member of the public on request. As will be seen later in this paper, any order under s.58 prohibiting or limiting access to court documents has to accord with Charter principles in order to be valid.

Openness Principle Applies to All Stages of Legal Proceedings

The principle of openness of judicial proceedings applies throughout all stages of the proceedings. The policy considerations upon which openness is predicated are the same at the trial and pretrial or investigative stages. See: ***Re Vancouver Sun***, at paras 23- 27 and ***Toronto Star newspapers Ltd v. Ontario***, 2005 SCC 41 at paras 29-33. However, the rule of openness is not absolute. Sometimes, as Mr. Justice La Forest said in ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1996] 3 S.C.R. 480 at para. 29 "the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable." Accordingly, there are exceptions; for example in the case of ex parte applications by police for investigative aids such as search warrants, wiretap authorizations, and in most cases DNA warrants. See: ***Re Vancouver Sun*** at para. 37. These require a certain amount of secrecy to be effective. However, in the case of search warrants, there is a presumption favouring access once they are executed. See: ***Toronto Star Newspapers***.

The Charter and Gathering the News

The openness principle attained constitutional status with the coming into force of the *Charter* on April 17, 1982. The Ontario Court of Appeal in ***R. v. Southam Inc.*** (1983), 34 C. R. (3d) 27, recognized the right of the media to gather information about, and to report on, judicial proceedings as an aspect of the right to freedom of expression as guaranteed by s.2(b). Writing for the Supreme Court of Canada in ***Canadian Newspapers Co. v. Canada (A.G.)***, [1988] 2 S.C.R. 122, a case dealing with whether a mandatory publication ban violated s. 2(b) of the *Charter,* Lamer J. said at p. 129:

> Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.

In 1989 the Supreme Court of Canada in ***Edmonton Journal*** struck down Alberta legislation prohibiting the publication of details pertaining to matrimonial proceedings and other

civil proceedings because it violated s.2(b) of the *Charter*. Cory J. said at p.1337:

> There can be no doubt that the **courts play an important role in any democratic society . . . as a result . . . the courts must be open to public scrutiny and to public criticism** of their operation by the public. (emphasis added)

He went on to say at pp. 1339-40:

> There is another aspect to freedom of expression which was recognized by this court in ***Ford v. Quebec (Attorney-General)***, [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression 'protects listeners as well as speakers.' That is to say, as listeners and readers, **members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. . . . Those who cannot attend rely in large measure upon the press to inform them about the court proceedings - the nature of the evidence that was called, the arguments presented, the comments made by the trial judge - in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can learn what is transpiring in the courts. They as listeners or readers have a right to receive this information**. . . . Practically speaking, this information can only be obtained through newspapers and other media. (Emphasis added)

At p. 1347 he stated:

> The importance of freedom of expression and of **public access to the courts through the press reports of evidence, arguments, and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.** (Emphasis added)

In ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, La Forest J., writing for the full court, reiterated much of what had been said in earlier cases about the openness principle and the important role of the media in disseminating information to the public about court proceedings. At para. 23 he said that the **"principle of openness is inextricably tied to the rights guaranteed by s. 2(b)."** On the importance of press access to the courts he said at paras. 23 to 26:

> [23] ... That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom. **The full and fair discussion of public institutions, which is vital to any democracy, is the raison d'être of the section 2 (b) guarantees . . . Debate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press**. **The public entitlement to be informed imposes on the media the responsibility to inform fairly and accurately.** This responsibility is especially grave given that freedom of the press is, and must be, largely unfettered . . . (emphasis added)
>
> [24] Essential to the freedom of the press to provide information to the public is the ability of the press to have access to the information. In ***Canadian Broadcasting Corp. v. Lessard***, [1991] 3 S.C.R. 421, I noted that **freedom of the press not only encompassed the right to transmit news and other information, but also the right to gather this information. . . .** (emphasis added)
>
> [25] It is by ensuring the press access to the courts that it is enabled to comment on court proceedings and thus inform the public of what is transpiring in the courts . . .
>
> [26] ... As a vehicle through which information pertaining to these courts is transmitted, **the press must be guaranteed access to the courts in order to gather information.** (Emphasis added)

Section 2(b) isn't the only section of the *Charter* that guarantees openness and media access. In ***R. v. Mentuck***, [2001] 3 S.C.R. 442 at para. 52, the Supreme Court of Canada said the right of an accused to a "public hearing" as protected by s. 11(d) of the *Charter* "guarantees not only an open courtroom but the right to have the media access that courtroom and report on the proceedings."

Gathering News Electronically

Although the Supreme Court of Canada has spoken of the importance of a vigorous and accurate press to our democratic society and has acknowledged the right of the media to gather court news, it remains controversial whether that includes the right to use modern technological

means to do so. It has long been recognized that a court, in furtherance of the proper administration of justice, has the right to control its own process including the publicity given to its proceedings. See: ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, per La Forest J., at paras. 36 and 37. That right of course must be exercised in a manner consistent with statutory and constitutional requirements. Reporters have traditionally been allowed to take handwritten notes and sketch artists have been allowed to make drawings of participants but nowadays, the debate is over the use of television cameras and audio recorders.

In the case of ***R. v. Pilarinos and Clark*** 2001 BCSC 1332, involving criminal charges against the former premier of British Columbia, members of the media including Global TV applied to televise the proceedings. The motion was heard and denied by Madam Justice Bennett of the British Columbia Supreme Court. She held:

> (a) in British Columbia there was a common law rule prohibiting the use of cameras in the courtroom during proceedings;
> (b) the right to gather news does not give the media any special rights of access to the courts different from those of any member of the general public; and
> (c) the right to gather the news does not include the right for the media to use television cameras and audio recorders in the courtroom.

She said at para. 75:

> The decisions that say the press has the 'right to gather information' were made in the context of rulings or legislation that prevented the press from entering the courtroom altogether, and therefore prevented the press from 'gathering information.' Excluding cameras and tape recorders from the courtroom does not prevent the gathering of information, as the courts are open to everyone.

She held that excluding cameras and tape recorders only limits the technical manner in which information is gathered and that, she concluded, is not a constitutionally protected right.

Global sought to challenge the ruling of Madam Justice Bennett in the Supreme Court of Canada and leave to appeal was granted. That is an indication that the issue of tv and radio access to the courts is one the Supreme Court considered to be of some national importance. However, after the constitutional questions were set and the appeal was perfected, but before it came on for hearing, the trial of Premier Clark finished in British Columbia. As a result, the respondents made a motion to quash the appeal by Global to the Supreme Court of Canada because the outcome would no longer have any effect on the trial. The motion was granted because the Supreme Court agreed the appeal had become moot and it saw no reason to exercise its discretion to allow it to proceed. Therefore, the following issues will have to wait for another day in the Supreme Court of Canada:

(a) whether there is a common law rule prohibiting the recording or transmitting of images or sound or both using any non-manual device ("recording") by media in the courtroom during a trial or other proceedings;
(b) if so, whether the rule is an infringement or denial of rights guaranteed by s. 2(b) of the *Charter*; and
(c) if so, whether such an infringement or denial is a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

All P.E.I. courts allow media representatives to use audio recorders in the courtroom for note taking purposes only. The Appeal Division of the P.E.I. Supreme Court has allowed the televising of some appellate proceedings.

Two other cases of interest in relation to television and the courts are: ***R. v. Squires*** (1992), 11 O.R. (3d) 385 (O.C.A.) and ***New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)***, [1993] 1.S.C.R. 319 per Cory J.

In ***Squires*** the majority (3-2) of the Ontario Court of Appeal upheld a legislative provision prohibiting the filming of persons entering and leaving a courtroom. All five members of the panel found the prohibition constituted an infringement of s. 2(b) of the *Charter* but the majority found it was saved by s.1. However, Osborne J.A., one of the majority, took pains to point out that the decision was limited to the relatively unimportant issue of the prohibition of filming persons entering or leaving the courtroom. He made clear at the outset of his reasons that the court did not consider, and that its reasons did not address the issue of whether cameras should be allowed in the courtroom or hallways of courthouses as opposed to the doorways. He held the prohibition on filming at the doorways to be a justified limit under s. 1 of the *Charter* but then went on to say:

> I would not wish to be taken to have expressed, in a constitutional context, the same views with respect to television in courtrooms and in the courthouse hallway areas.

The case of ***New Brunswick Broadcasting v. Nova Scotia*** involved the Nova Scotia Legislature's refusal to allow the media to televise its proceeding from the public gallery using hand-held video cameras. The majority of the Supreme Court of Canada held the prohibition as a valid exercise of a constitutional parliamentary privilege and that s. 2(b) was therefore not engaged. However, in a courtroom context parliamentary privilege would not be an issue and s. 2(b) would be engaged. This leaves open the possibility that the views expressed by Cory J., who dissented, might have held more sway if the case had been about a ban on the televising of court proceedings rather than legislative proceedings. At paras. 190 and 191 Cory J. said:

> The television media constitute an integral part of the press. . . . The video camera provides the ultimate means of accurately and completely recording all that transpires. . . . It provides the nearest

> and closest substitute to the physical presence of an interested observer.
>
> So long as the camera is neither too pervasive nor too obtrusive, there can be no good reason for excluding it. How can it be said that greater accuracy and completeness of reporting are to be discouraged? Perhaps more Canadians receive their news by way of television than by any other means. If there is to be an informed opinion in today's society, it will in large part be informed by television.

However, it should also be pointed out that Mr. Justice Cory was not saying there should be no limits on the television media. He allowed, at para. 192, the Legislature could regulate the number, location and manner of operation of cameras. What the Legislature could not do, he said, "is exclude television entirely by means of regulation without infringing s. 2(b)."

Limiting Access

Although freedom of the press is fundamental and court proceedings at all stages are presumptively open the right is not absolute. In ***Toronto Star Newspapers Ltd.*** Fish J. said at para 3:

> ... under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

Sometimes restrictions are mandated by legislation and sometimes they are imposed through the exercise of judicial discretion. Laws mandating restrictions such as sections 517(1), 486(3) and 486(4) of the ***Criminal Code*** must comply with the *Charter*. Judicial discretion too must be exercised in accordance with the *Charter*. That is so whether it arises under the common law, is authorized by statute, or under rules of court. See: ***Re Vancouver Sun*** at para. 31.

Canadian Newspapers Co. v. Canada (Attorney-General), [1988] 2 S.C.R. 122 involved a mandatory ban on publication of the identity of a complainant in a sexual case upon his or her request as provided for in what is now s.486(4) of the ***Criminal Code***. In that case the Supreme Court found that the provision mandating the restriction violated s. 2(b) of the *Charter* but that it met the test for justification under s. 1. The court found that the objective of the legislation addressed a pressing and substantial concern; that the provision was rationally connected to the objective; that it imposed only minimal limits on the media's rights; and that a discretionary provision would not be effective.

In ***Dagenais v. Canadian Broadcasting Corp.***, [1994] 3 S.C.R. 835, a case regarding discretionary orders restricting publicity, members and former members of a Catholic religious order were charged with physical and sexual abuse of young boys in their care at training schools in

Ontario. They applied to a superior court for an injunction restraining the CBC from broadcasting the mini-series *The Boys of St. Vincent*, a fictional account of physical and sexual abuse of children at a Catholic institution in Newfoundland. At the time of the hearing for the injunction, the trials of Dagenais and the others charged with similar offences were being held or scheduled to be heard before a judge and jury in Ontario. The Superior Court Judge granted the injunction prohibiting the broadcast anywhere in Canada until the end of the trials and also prohibiting the fact of the publication of the application for the injunction and any material relating to it.

The Ontario Court of Appeal upheld the decision to grant the injunction but limited its scope to Ontario and one station in Quebec. As well, the Court of Appeal reversed the order banning any publicity about the proposed broadcast and the very fact of the proceedings giving rise to the publication ban.

Both the Superior Court and the Court of Appeal had given priority to the right to a fair trial over freedom of the press. The case was further appealed to the Supreme Court of Canada. That court allowed the appeal and set aside the publication ban because it was too broad and other reasonable alternative measures were available to protect the fairness of the trials. Writing for the majority of the Supreme Court of Canada, Lamer C.J. said at p. 876:

> Like the right of an accused to a fair trial, a fundamental principle of our justice system which is now expressly protected by s. 11(d) of the *Charter*, freedom of expression, including freedom of the press, is now recognized as a paramount value in Canadian society, as demonstrated by its enshrinement as a constitutionally protected right in s. 2(b) of the *Charter*. **Section 2(b) guarantees** the rights of all Canadians to 'freedom of thought, belief, opinion and expression, including **freedom of the press and other media of communication**.' (Emphasis added)

At pp. 877-8 Lamer C.J.C. went on to say:

> The pre-*charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those effected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular the equal status given by the *Charter* to ss. 2(b) and 11(d). **It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b).** A hierarchal approach to rights, which places some above others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charte*r principles require a balance to be achieved that fully respects the importance of both

sets of rights. (Emphasis added)

The former Chief Justice of Canada then reformulated the common law rule regarding publication bans in order to make it accord with *Charter* principles. He stated the new rule at p.878 as follows:

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

In ***Dagenais*** the Supreme Court of Canada held that a party seeking a publication ban must prove that the ban is necessary in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure; that the proposed ban is limited in scope, time, and content as possible; and that there is proportionality between the salutary and deleterious effects of the ban. The Supreme Court also held that a judge considering a ban on publication must consider all the options besides the ban and must find that there are no reasonable and effective alternatives available. The judge must consider all possible ways to limit the ban and must limit the ban as much as possible. The judge must weigh the importance of the objectives of a proposed ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

In ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*** the Supreme Court of Canada unanimously upheld the constitutionality of s. 486(1) of the ***Criminal Code*** which affirms the openness principle but gives the presiding judge discretion to exclude the public, including the media, in the interests of public morals, the maintenance of order or, the proper administration of justice. The Supreme Court found that the section violated s.2(b) of the *Charter* but that it was a reasonable limit demonstrably justified under s. 1, provided the discretion was exercised in accordance with the *Charter*'s demands in each individual case. Writing for the court La Forest J. made the following comments at paras. 71 and 72 on the procedure to be followed upon an application for exclusion under s.486(1):

> The burden of displacing the general rule of openness lies on the party making the application. As in ***Dagenais, supra***, the applicant bears the burden of proving: that the particular order is necessary, in terms of relating to the proper administration of justice; that the order is as limited as possible; and that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional

> right, this must be considered.
>
> There must be an evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard in camera. This may be done by way of a voir dire from which the public is excluded.

La Forest J. went on to say at para.75:

> The information available to the trial judge must allow a determination as to whether the order is necessary in light of reasonable and effective alternatives, whether the order has been limited as much as possible and whether the positive and negative effects are proportionate.

Justice La Forest found the Provincial Court Judge did not have a sufficient evidentiary basis to make the order excluding the public and media. He held that neither the Crown's submission that the evidence to be brought was of a "delicate nature" nor the fact that the victims were young females sufficed to warrant exclusion. The victims were already protected by a publication ban, and there was no evidence their privacy required more protection. There was no evidence the victims or the accused would suffer undue hardship if an order under s.486(1) was not granted.

In ***Dagenais*** the common law rule on publication bans was reformulated in the context of conflict between an accused's right to a fair trial and society's interest in freedom of expression. However, not every case involving publication bans involves such a conflict. Sometimes publication bans are sought to accommodate interests of the administration of justice other than fair trial rights. In ***Mentuck*** and another case it decided on the same day, ***R. v. O.N.E.***, [2001] 3 S.C. R. 478, the Supreme Court of Canada dealt with situations where common law publication bans had been applied for in the courts below to protect the identity of police officers and the operation and nature of the undercover techniques they had employed during their investigation of the accused. In ***Mentuck*** the trial judge granted the order to protect the identity of the officers but refused the request for a ban relating to the operations of the police. In ***O.N.E.*** the trial judge granted a ban respecting both identity and operational methods. Recognizing that crucial aspects of the administration of justice other than fair trial interests could provide a legitimate basis for common law publication bans, Iacobucci J., writing for the full panel of the Supreme Court, further refined the test reformulated in ***Dagenais*** so as to accommodate a broader spectrum of interests. See ***Mentuck*** at para.32. This reformulation does not take away from the essence of ***Dagenais***; it just broadens the test so as to provide a proper analytical approach for cases where applications for common law publication bans are based on concerns about the proper administration of justice other than, or in addition to, trial fairness.

Iacobucci J. at para. 34 emphasized that to justify a publication ban, the risk to the proper administration of justice must be a "serious" one, the reality of which is "well grounded in the evidence." At para. 35 Iacobucci J. cautioned against giving "the proper administration of justice" too broad a meaning. He said: "... courts should not interpret that term so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest." In para. 36 Iacobucci J. reminds us that in ruling on applications for publication bans the judge is required not only to consider reasonable alternatives but also to restrict the order, if granted, as far as possible without sacrificing the prevention of the risk. At para. 60 Iacobucci J. says that publication bans are to be supervised by the issuing court and that they should be for a definite period.

In ***Mentuck*** Iacobucci J. found the ban on identifying the officers met the ***Dagenais*** test, as he had refined it, but that the request for a ban regarding the undercover operational methods did not. He held that the ban regarding operation methods would pass neither the necessity nor the proportionality aspects of the test. After concluding the salutary effects that would be produced by the ban were not compelling or significant he went on to say at para. 50:

> The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by democratically elected officials; our country is not a police state. The tactics used by the police, along with other aspects of their operation, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourages the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed of what may be controversial police actions.

In ***O.N.E.*** the Supreme Court also upheld the ban on identifying the officers involved but struck down the ban on the publication of information pertaining to the operation methods used by the police. Iacobucci J. again writing for the full court, held that the latter ban did not meet the necessity or proportionality aspects of the test he formulated in ***Mentuck***. After finding the salutary effects of the ban pertaining to the operation methods not to be compelling, he said a para. 13:

> The deleterious effects, however are substantial. The freedom of the press is abridged in respect of discussions that lie at the core of freedom of expression -- discussions of the proper role and acceptable activities of the police. Furthermore, the accused's right to a public trial, and the vindication associated with public awareness of the nature of the evidence on which she was acquitted, are seriously compromised by the ban. An acquittal can be difficult to

> live with when the public believes that it was gained only on a 'technicality,' rather than because there were serious doubts about the authenticity of the confession at issue in the case. I take note that in this case media reports largely portrayed the accused as having been acquitted on technical grounds, when in fact credibility of the Crown's major evidence -- the accused's confession -- was the major issue of fact.

It is important to note that while the ***Dagenais / Mentuck*** test was developed in the context of publication bans, it applies equally to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. See: ***Re Vancouver Sun*** at para. 31 and ***Toronto Star Newspapers Ltd v. Ontario*** at para. 7.

Although the ***Dagenais/Mentuck*** test is applicable to discretionary orders at every stage of the judicial process it is to be exercised in a flexible and contextual manner and not mechanistically. Thus, different considerations may apply at the investigative stage than at the trial stage. See: ***Toronto Star Newspapers Ltd. v. Ontario*** at paras. 8 and 30.

Burden of Displacing Presumption of Openness

The burden to displace the presumption of openness is on the party seeking a restriction. Public access will only be barred when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*. Even at the investigative stage there must be more than a bald or generalized assertion that publicity could compromise investigative efficacy in order to justify a restriction on access. Thus in the context of an executed search warrant, the Supreme Court of Canada has held that the party seeking a restriction, on grounds that disclosure would interfere with an ongoing investigation, must identify and demonstrate a serious and particularized risk to the integrity of the investigation that would result from public disclosure of the warrant and the information used to obtain it. A Restriction cannot be imposed just to give law enforcement officers an investigative edge. See: ***Toronto Star Newspapers Ltd v. Ontario*** .

Notice to the Media

In ***Dagenais*** the Supreme Court of Canada held that the media should be given reasonable notice of applications for discretionary orders limiting access or publicity so that they can seek standing to be heard on the motion. In ***R. v. Toronto Newspapers Ltd***, 67 O.R. (3d) 577, [2003] O.J. No. 4006, the Ontario Court of Appeal held that a provincial court judge had made a "clear jurisdictional error" in refusing to grant a brief adjournment to a representative of media who just happened to be present in court when the Crown brought an ex parte application for an order sealing certain executed search warrants and the informations on which they were obtained. The court of appeal, per Doherty J., held that the representative had an interest in the subject matter of the proceedings because the media has an important role to play in applications brought to prohibit public access to court records or to prohibit the publication of court proceedings

Duty of the Judge when Ban Application Unopposed

When the application for the publication ban was made at the trial level by the R.C.M.P. in ***O.N.E***. it was not opposed by the Crown or the defence, and although notice was given, no media representatives appeared. Such a situation should not result in a quick and easily obtained order. In ***Mentuck*** the Supreme Court of Canada again demonstrates the fundamental importance attached to the openness principle by the direction it gives to judges for dealing with cases where the application for a publication ban is unopposed. Iacobucci J. at para. 38 says:

> ...when there is no party or intervenor present to argue the interests of the press and public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially, where Charter protected rights such as freedom of expression are at stake. . . . In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.

At para. 39 Iacobucci J. went on to say:

> It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering while important in its own right, should not be regarded as weakening the strong presumptive public interest, that may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.

Privacy and Confidentiality Considerations

In ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*** LaForest J. noted at para.37, the court's power to regulate its process including publicity serves, among other things, to protect the privacy of victims and witnesses. However, the openness principle generally trumps the privacy concerns of those caught up in the system unless some restriction on access or publicity is necessary to prevent a serious risk to the proper administration of justice. The following

comments of Laurence J. in ***R. v. Wright***, 8 T.R. 293 were subsequently cited with approval by Duff J. in ***Gazette Printing Co. v. Shallow*** (1909), 41 S.C.R. 339 at p. 359 and by Dickson J. in ***MacIntyre, supra,*** at p.185:

> 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 the courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.

In ***MacIntyre***, Dickson J. said at p. 185:

> Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for the exclusion of the public from judicial proceedings.

However, Dickson J. did acknowledge that protection of the privacy of the innocent was a matter of superordinate importance that could justify limiting media access to search warrants in cases where nothing was found upon execution.

In ***Vickery v. N.S.S.C. (Prothonotary)***, [1991] 1 S.C.R. 671, the majority of the SCC held that the privacy interests of a person acquitted of a crime outweighs the public right of access to exhibits judicially determined in open court to be inadmissible against him. However, it is important to note s. 2(b) of the *Charter* was not considered by the Supreme Court in ***Vickery*** because it had not been raised in argument before the court of first instance.

In ***Edmonton Journal,*** Cory J. at pp. 1346-7 seemed to imply that a trial judge has discretion to prohibit publication or to hold in-camera hearings where necessary in order to protect the privacy interest of parties, their children or witnesses. However, in the subsequent ***Dagenais*** case at p.875 Lamer C.J.C. cautioned that neither legislation nor the common law can confer discretionary power to infringe the *Charter*. Any discretion to interfere with court openness has to be exercised in compliance with *Charter* principles according to the **Dagenais /Mentuck** test.

In the case of ***A.B. v. College of Physicians*** 2001 PEISCTD 75, MacDonald C.J.T.D., as he then was, granted an order prohibiting the publication of a plaintiff doctor's name or speciality. The purpose of the order was not to protect the doctor himself but to protect the privacy of a former patient. It was agreed by all parties, including the local newspaper, the *Charlottetown Guardian,* that the patient's privacy should be protected. However, in challenging the order the *Guardian* took the

position that the patient's privacy could be adequately protected without prohibiting the publication of the doctor's name. The doctor was the one who had invoked the court process. The *Guardian* did not think he should be able to do so anonymously. Chief Justice MacDonald made the order prohibiting publication of the doctor's name after concluding it was necessary to do so to protect the former patient's privacy. The decision was not appealed. If it had been it would likely have been tested on whether or not it accorded with *Charter* principles as required by ***Dagenais*** and ***Mentuck***, and whether there was a sufficient evidentiary basis for the exercise of discretion as required by ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***.

In ***R. v. Unnamed Person*** (1985), 22 C.C.C. (3d) 284, the Ontario Court of Appeal made it clear that so far as it is concerned preventing embarrassment is not a sufficient basis for limiting publicity surrounding legal proceedings. That case dealt with an application by an accused in a criminal case to have a ban placed on publishing her identity so as to avoid embarrassment and detrimental employment effects to herself and her family. The lower court had invoked inherent jurisdiction to grant the order. The Court of Appeal set it aside. The Court of Appeal acknowledged that a superior court has inherent jurisdiction to make an order prohibiting publication where necessary to protect a trial which is being conducted before it or to assist an inferior court to administer justice fully and effectively. However, it held that the non publication order that had been made in the court below had little, if anything, to do with protecting the process of the court. The Court of Appeal said that the court did not have jurisdiction to, in effect, create a discretionary right of privacy to be extended to those caught up in the criminal process.

It may be that the Ontario Court of Appeal overstates the case. In ***Edmonton Journal***, Cory J. at pp.1346-7 seemed to imply judges have discretion to prohibit publication or to hold in-camera hearings where necessary to protect the privacy interests of parties, their children or witnesses and in ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*** at para. 42 La Forest J. says "the right to privacy is beginning to be seen as more significant." However, he also pointed out that in this area of the law, privacy interests are more likely to be protected where it affects some other social interest or where failure to protect it will cause significant harm to the victim or to witnesses. At para. 41 he noted that mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom.

Sections 57 and 58 of the PEI Supreme Court Act

Section 57(2) of the P.E.I. ***Supreme Court Act*** authorizes the court to exclude the public where the "**possibility of serious harm to any person"** justifies a departure from the general principle of openness. This provision has never been constitutionally tested but it is worth noting that in ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*** La Forest J. at para.81 said:

> With respect to concerns relating to undue hardship, it is my view that where the circumstances and the evidence support such concerns, 'undue hardship on the persons involved' may, in the interests of the proper administration of justice, amount to a legitimate reason to order exclusion.

However, this discretion too would have to be exercised in accordance with *Charter* principles.

Section 58(2) of the P.E.I. ***Supreme Court Act*** authorizes a judge **"for the purpose of confidentiality"** to order that any civil document filed in a civil proceeding be sealed and not form part of the public record. In ***S.P. v. Director of Child and Family Services of the Province of Prince Edward Island***, 2005 PESCTD 61, Cheverie J. granted a motion for summary judgment dismissing the action and at the same time made an order under s. 58(2) of the ***Supreme Court Act*** sealing the entire court file relating to the case. The case was a civil action commenced by a self-represented litigant claiming damages against the Director of Family and Child Services arising from a child protection matter that had been previously litigated. It is not clear what, if anything, was in the file apart from the pleadings and the materials relating to the motion for summary judgment. The media had been given notice of the motion to seal the file but no representative appeared at the hearing. In dealing with the motion for sealing Cheverie J. noted that the ***Child Protection Act***, R.S.P.E.I. 1988, Cap. C-5.1 and its predecessor the ***Family and Child Services Act***, R.S.P.E.I. 1988, Cap. F-2 each contained provisions requiring that information obtained in the course of administering those acts not be disclosed except as provided for in the legislation. He also noted that the ***Child Protection Act*** limits the persons who are entitled to be present at court hearings under that legislation and that the general public is excluded. He then went on to refer to the considerations that should be taken into account and the balancing of interests process that must be followed in deciding whether to grant a sealing order. At paragraph 18 of the decision where he concludes:

> The real impetus for the present litigation originates in the previous fully litigated child protection case. Information about child protection cases and their very process through the have been afforded confidentiality by the legislature. That is in the public interest. If the documents which constitute the file in the present case were allowed to be open for public inspection, in my view, that would serve to undermine what is at the heart of our child protection legislation and, therefore, would not be in the public interest. Rather, the public interest would be better served, on balance, if an order were to issue sealing all documents filed in this action and providing that the court file not form part of the public record.

Although Cheverie J. referred to the Supreme Court of Canada's comments on limiting freedom of expression in ***RJR MacDonald-MacDonald Inc. v. Canada (Attorney General),*** [1995] 3 S.C.R. 199, ***Mentuck***, and ***Harper v. Canada (Attorney General)***, [2004]1 S.C.R. 827, he did not refer to its decision in ***Sierra Club of Canada v. Canada (Minister of Finance)***, 2 S.C.R. 522. That was a case concerning an application for a confidentiality order under Federal Court Rule 151 to protect the commercial interests of a party to litigation. The Supreme Court held that the fundamental question for the judge considering an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. According to Iacobucci J. who wrote for the Court the discretion to grant the order must be exercised in accordance with Charter principles. Thus a confidentiality order should only be granted when (a) such an order is necessary

to prevent a serious risk to an important interest, which may include an important commercial interest, because reasonable alternative measures will not do so; and (b) the salutary effects of the confidentiality order outweigh the deleterious ones. The Supreme Court also held that if a judge decides to grant a confidentiality order it must be no wider than what is necessary to prevent the risk.

Appendix

The following is an inventory of Federal and P.E.I. legislation limiting or authorizing courts to limit the open court principle.

I. Federal Legislation

1. General

Section 486(1) of the ***Criminal Code*** provides that any proceedings against an accused shall be held in open court, but that the presiding judge may order the exclusion of all or some members of the public from the courtroom for all or part of the proceedings if in his or her opinion it is in the interests of public morals, the maintenance of order or the proper administration of justice to do so or that it is necessary in order to prevent injury to international relations or national defence or national security. Provided the discretion is exercised in accordance with the *Charter*'s demands in each individual case, section 486(1) has been held constitutional as a reasonable limit on the freedom guaranteed by s. 2(b) of the *Charter* in ***C. B. C. v. N.B. (A-G)***.

2. Sex offences, Criminal Interest Rates, Extortion

A. In sexual offences s. 486(3) of the ***Criminal Code*** ("CC") gives the presiding judge authority to make an order banning publication of any information that could disclose the identity of the complainant or a witness in cases where the accused is charged with various sex-related offences, charging a criminal rate of interest or extortion. This will sometimes mean that the name of the accused cannot be disclosed. There is no ban if an order is not made. However, the judge has no discretion and must make the order if the complainant, the prosecutor or a witness under the age of 18 applies for it. The judge also has the responsibility at the earliest reasonable opportunity to do so to inform a witness under 18 and the complainant of the availability of the ban upon application. This provision has been held constitutional by the Supreme Court of Canada in ***Canadian Newspapers Co. v. Canada (A-G)***.

B. Section 276.3 of the CC makes it an offence to publish certain aspects of the hearing held under ss. 276.1 and 276.2 which are held in-camera and in the absence of the jury to determine the admissibility of sexual activity evidence as permitted by s. 276. This section prohibits publication of the application and the proceedings under ss. 276. and 276.2 and of the court's decisions under 276.1 unless otherwise

ordered by the judge. As well, the decision under s. 276.2 cannot be published unless it is determined that the evidence is admissible or the court otherwise orders.

C. Section 278.9 makes it an offence to publish or broadcast the contents of an application under 278.3 of the ***Criminal Code*** by an accused for the production of personal information records of a complainant or witness or to publish or broadcast any of the proceedings of an in camera hearing under s 288.4 of the ***Criminal Code*** relating to such application. Moreover s. 278.9 makes it an offence to publish or broadcast the judge's reasons unless the judge orders the determination may be published taking into account the interests of justice and privacy interests. In the case of ***R. v. Mills***, [1999] 3 S.C.R. 668 the Supreme Court of Canada held that sections 278.1 to 278.91 do not violate ss. 7, 8, 11(d), or 15 of the *Charter*.

3. **Power to ban publication in other criminal cases**

Subsection 486(4.1) to (4.9) provide for the making of publication bans respecting the identity of victims and witnesses and sometimes "justice system participants" in cases where the accused is charged with offences other than those referred to in subsection 486(3).

4. **Youth Criminal Justice Act**

A. Section 110 of the ***Youth Criminal Justice Act*** ("YCJA"), subject to some specified exceptions, prohibits the publishing of the name of a young person or any other information related to a young person if it would identify him or her as a young person dealt with under the YCJA. Subsection 38(1) of the ***Young Offenders Act*** which was worded similarly to this section was held not to be unconstitutional infringement on the guarantee to freedom of expression in s. 2(b) of the *Charter*. ***R. v. Southam Inc***. 14 D.L.R. (4th) 683 (Ont. H.C.J.), affirmed 26 D.L.R. (4th) 479 (Ont. C.A.), leave to appeal to S.C.C. denied.

B. Section 111 of the YCJA, subject to some specified exceptions, prohibits the publication the name of a child or young person or any other information related to a child or young person that would identify him or her as having been a victim or a witness in connection with an offence alleged to have been committed by a young person.

C. Section 132 of the YCJA gives the presiding judge wide discretion to close the courtroom to exclude particular persons from the courtroom. If the trial judge thinks that information or evidence presented would be seriously

injurious or seriously prejudicial to the young offender, young witness or young victim, or if it would be in the interest of public morals or the maintenance of order, he or she may exclude the public generally or any section of the public. A similarly worded section of the YOA was held not to be an unconstitutional infringement on the right to access to the courts as included in the guarantee in s. 2(b) of the *Charter*. ***R. v. Southam Inc., supra.***

D. Section 118 of the YCJA provides that, except as authorized or required under the YCJA, no person shall be given access to youth justice court records or any information contained therein where to do so would identify the young person to whom it relates as a young person dealt with under that Act.

5. **Preliminary Inquiries**

A. Section 539 of the CC gives a justice hearing a preliminary inquiry authority to ban publication of the evidence. The justice may make the order if it is applied for by the prosecutor but must make it if it is applied for by the accused. The point about a preliminary inquiry is that some of the evidence introduced may never be introduced at the trial or may be ruled inadmissible. Publication of that evidence might prejudice the outcome of the subsequent trial. The application for a publication ban relating to the evidence taken at a preliminary inquiry must be made before it begins. If made, the publication ban remains in place until such time as it is no longer possible to prejudice the outcome of a subsequent trial. That is, until the accused is discharged because the evidence is insufficient for a trial or when the trial has been completed. The fact that publication is banned does not mean that reporters cannot be present or that they cannot take notes for later use when the ban becomes spent. It is up to a reporter to find out whether a ban has been made. Section 539(3) of the CC makes it an offence to fail to comply with a publication ban.

B. Section 542 of the CC creates an absolute prohibition against publishing anything about the fact that the Crown may have sought to have a confession entered into evidence during a preliminary inquiry. This ban exists independently of an order under s.539 and it too is spent when it is no longer possible to prejudice the trial.

C. Subsection 537(1)(h) authorizes a justice to exclude the public from the courtroom where the preliminary inquiry is being heard when it appears to him or her that the interests of justice would be best served by doing so.

6. **Bail Hearings**

A. Section 517 of the CC allows for banning the publication of evidence introduced at a bail hearing. The judge must impose the ban if the accused applies for it. He has a discretion if the prosecution is the applicant. The application can be made at any time during the bail hearing, and if granted, will apply even to evidence heard before the making of the application as well as to any other information introduced including the reasons given by the justice for his or her decision. If a ban is made, the reporters may remain and take notes but they cannot publish the evidence or information until it is no longer possible to prejudice the trial. It is an offence not to comply with a ban under s.517. The temporary ban on publication provided for in s. 517 was held to not be unconstitutional in ***Global Communications Ltd. v. Canada (A-G)*** (1984), 10 C.C.C. (3d) 209 (O.C.A.).

7. **Jury Trials**

A. If the Jury is permitted to separate, s.648 of the CC provides that no one can report on anything that happens when the jurors are out of the courtroom. If on the other hand the jury is sequestered, or once it is sequestered, reporters are free to report on things that happen or happened in the courtroom when the jurors were not there. The ban under s.648 is not discretionary.

B. Section 649 of the CC makes it an offence, except in an investigation regarding jury tampering or perjury offences, for a juror to disclose to anyone any information about what went on in the jury room.

8. **Disposition Hearings under the Mental Disorder provisions in Part XXIV of the Criminal Code.**

A. Subsection 672.5(6) of the CC authorizes the court or review board in certain circumstances to exclude the public from a disposition hearing regarding a person found not fit to stand trial or found not criminally responsible for an offence due to mental disorder.

B. Subsection 672.51(11) prohibits publication of information disclosed at a disposition hearing in certain circumstances.

C. Subsection 672.52(11) of the CC makes it an offence to publish any disposition information that is prohibited from being disclosed pursuant to s-s. 672.51(7) or any part of the record of the proceedings in respect of which the accused was excluded pursuant to subparagraph 672.5(10)(b)(ii) or (iii) of the ***Criminal Code***.

9**.** **Warrants**

A. Section 487.3 of the CC gives a judge or justice power to make an order denying access to and disclosure of any information relating to a warrant issued under the CC or any other Act of Parliament, an authorization to enter a dwelling under s. 529, or authorization to enter a dwelling unannounced under s. 529.4.

B. Section 487.2 of the CC applies certain restrictions on the publicity that can be given in situations involving warrants, It makes it a summary conviction offence to publish the location of the place searched or to be searched, or the identity of any person who appears to occupy, possess or control that place, or who is suspected of being involved in any offence relating to the warrant. Such information may be published if the consent of all of the forgoing persons has been obtained or if a charge in respect of any offence in relation to which the warrant was issued has been laid. Courts in Manitoba and Ontario have held this provision to be unconstitutional violation of s. 2(b) of the *Charter* and hence of no force or effect.

10. **Wiretaps/Intercepted Cell Phone Calls**

Section 193 of the CC, subject to certain exceptions, makes it an indictable offence to disclose information obtained through wiretaps. It is an offence to even disclose that such information exists. Likewise s. 193.1, subject to certain exceptions, makes it an offence to disclose the contents of intercepted cell phone calls.

11. **Documents Seized from Lawyer**

Subsection 488.1(10) mandates a private hearing in the case of an application under section 488.1 to determine a claim of solicitor-client privilege regarding a document seized from a lawyer.

12. **P.E.I Rule of Practice (Rule 79) made pursuant to s-s. 745.64(1) of the CC by the Chief Justice of the Trial Division respecting applications and hearings for reduction in the number of years of imprisonment without eligibility for parole**

Rule 79.28 (2) provides:

> (2) where the judge is of the opinion that it is necessary to do so in the interest of public morals, the maintenance of order or the proper administration of justice, the judge may, at any time, order that any proceedings in relation to an application be held in camera or may order a total or partial ban on the

publication of any evidence presented
at any such proceeding.

13. **Terrorism**

During a judicial review proceeding under s-s. 83.05 of the CC the Solicitor General can require the judge to examine the matter "in private" This effectively empowers the minister to close the court without the judge having any discretion in the matter. This provision might not withstand a *Charter* challenge because it seems contrary to ***Ruby v. Canada (Solicitor General)***, [2002] 4.S.C.R. 3. Subsection 83.06 also compromises the open court principle because it gives the Crown the right to require a private hearing where a judge will decide whether to consider information obtained in confidence from a foreign state.

II. Provincial legislation (none of the following provisions have been the subject of a constitutional challenge to date**)**

1. **Supreme Court Act**

A. Section 57(2) and (3) of the ***Supreme Court Act***, R.S.P.E.I. 1988 Cap. S- 10 provides:

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm to any person justifies a departure from the general principle that court hearings should be open to the public.

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.

B. Section 58 (2) of the ***Supreme Court Act*** provides:

(2) For the purpose of confidentiality, a judge may order that any document filed in a civil proceeding be sealed and not form part of the public record.

C. Section 25(k) of the ***Supreme Court Act*** R.S.P.E.I. 1988 cap S-10 authorizes the making of Rules of Court relating to the hearing of applications in the absence of the public. Civil Procedure Rule 37.11 provides as follows:

37.11(1) A motion may be heard in the absence of the public where,

(a) the motion is to be made and heard without oral argument;

(b) because of urgency, it is impractical to have the motion heard in public;

(c) the motion is to be heard by conference telephone;

(d) the motion is made in the course of a pre-trial conference; or

(e) the motion is before a single judge of the Appeal Division.

(2) The hearing of all other motions shall be open to the public, except as provided in s. 57 of the ***Supreme Court Act*** in which case the presiding judge or officer shall endorse on the notice of motion leave for a hearing in the absence of the public.

2. **Family and Child Services Act**

Section 31 of the ***Family and Child Services Act*** R.S.P.E.I. 1988 Cap. F-2 provides as follows:

(1) No person other than the judge, counsel and witnesses in the case, officers of the law or an agency, the director or his representative or a child care worker, the child's parents and immediate relatives of the child and such other persons as the judge may allow shall be permitted by the judge to be present at the hearing.

(2) The judge may exclude the child from any part of the hearing.

Section 47 of the ***Family and Child Services Act*** provides:

(1) Subject to subsection (2), it is an offence for any person to publish at any time anything that would reasonably be likely to disclose to members of the public the identity of the child or a party to the proceedings under this Act.

(2) A report, comment or analysis concerning a proceeding may be published in a document designed primarily to assist those engaged in the practice of law or in legal or social research.

Section 48 of the ***Family and Child Services Act*** provides:

(1) Notwithstanding any other provision of law, a court having jurisdiction under this Act may punish persons for contempt or for wilful disobedience of any order or ruling made by the court in the exercise of that jurisdiction.

(2) Where a person is in contempt, the court may punish the contempt by ordering imprisonment, fine or both imprisonment and fine.

(3) No fine under this section shall exceed $1,000., and no term of imprisonment under this section shall exceed six months.

3. **Family Law Act**

Section 2(4) of the ***Family Law Act*** R.S.P.E.I. 1988 Cap. F.2.1 provides:

> The court may exclude the public from a hearing, or any part thereof, where, in the opinion of the presiding judge, the desirability of protecting against the consequence of possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public and the court may by order prohibit the publication of any matter connected with the application or given in evidence at the hearing.

Section 41(2) of the ***Family Law Act*** provides:

> Where, in the opinion of the court, the public disclosure of any information required to be contained in a statement under subsection (1) [financial statement] would be a hardship on the person giving the statement the court may order that the statement and any cross-examination upon it before the hearing be treated as confidential and not form part of the public record.

Section 48(1) of the ***Family Law Act*** provides:

> In addition to its powers in respect of contempt, the court may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules, or orders under this Act, but the fine shall not exceed $5,000. nor the imprisonment exceed ninety days.

4. **Adoption Act**

Section 32 of the ***Adoption Act*** R.S.P.E.I. 1988 Cap A-4.1 provides:

> The Hearing [of an application for adoption] shall be heard in private, and access to the court's files concerning an application to adopt shall be restricted, unless the court determines otherwise, having regard to the best

interests of the child.

5. **Custody Jurisdiction and Enforcement Act**

Section 9 of the ***Custody Jurisdiction and Enforcement Act*** R.S.P.E.I. 1988 Cap. C-33 provides:

> The court may exclude the public from a hearing, or any part thereof, where, in the opinion of the presiding judge, the desirability of protecting against the consequences of possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public and the court by order may prohibit the publication of any matter connected with the application or given in evidence at the hearing.

6. ***Maintenance Enforcement Act***, R.S.P.E.I. 1988 Cap. —1

Section 16 of the ***Maintenance Enforcement Act*** provides:

> The court may exclude the public from a hearing or any part of a hearing held pursuant to this act where, in the opinion of the presiding judge, the desirability of protecting against the consequences of possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public, and the court by order may prohibit the publication of any matter connected with the application or given in evidence at the hearing.

7. **Victims of Family Violence Act, R.S.P.E.I. 1988 Cap. V-2.3.**

Section 11 of the ***Victims of Family Violence Act*** provides:

> (1) The Registrar [of the Court] and a justice of the peace shall keep the victim's address confidential at the request of the victim or a person acting on behalf of the victim.
>
> (2) The court may exclude the public from a hearing, or any part thereof, where, in the opinion of the presiding judge, the possibility of injustice, harm, hardship or adverse effect to or upon a victim or a child outweighs the desirability of holding the hearing in public.
>
> (3) Upon request of the victim, the court may by order prohibit the public disclosure of a report of a hearing or of any part of a hearing or prohibit publication of any matter connected with an emergency protection order or victim assistance order, where in the opinion of the court, such disclosure or publication would (a) not be in the best interests of a victim or a child; or (b) be likely to identify, have an

adverse effect on or cause hardship to, the victim or child.

8. **Young Offenders (P.E.I.) Act R.S..P.E.I. 1988 Cap. Y-1.**

The ***Young Offenders (P.E.I.) Act*** applies to young persons charged with offences under a provincial enactment. Section 16(1) provides:

> 16(1) No person shall publish by any means a report of
>
> (a) an offence committed or alleged to have been committed by a young person;
>
> (b) 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 young person who appeared as a witness in connection with the offence, or in which any information serving to identify such person, is disclosed.

Section 17 provides:

> 17. Where a youth court is of the opinion that
>
> (a) any evidence or information presented to the court would be seriously injurious or seriously prejudicial to
>
> (i) the young person who is being dealt with in the proceedings, or
>
> (ii) a young person who is a witness in the proceedings;
>
> the court may exclude any person from all or part of the proceedings.

9. **Provincial Court Act, R.S.P.E.I. 1988 Cap. P-25.**

Section 10(1) and (2) of the ***Provincial Court Act*** provide:

> 10(1) Where the Lieutenant Governor in Council has reason to believe a judge is guilty of misbehaviour or is unable to perform his duties properly, he shall by order appoint a judge of the Supreme Court to inquire into and report on the matter.
>
> (2) a judge of the supreme court who is appointed pursuant to

> subsection (1) ... may direct that the inquiry be open to the public or held in camera.

10. **Jury Act, R.S.P.E.I. 1988 Cap J-5.1 .**

Subsection 32(3) of the ***Jury Act*** provides:

> Where the jurors separate pursuant to subsection (1), no person shall, before the jury retires to consider its verdict, publish in any newspaper or broadcast any information regarding any portion of the trial at which the jury is not present.

Subsection 32(5) provides:

> Every person who, having been a member of a jury that has rendered its verdict or been discharged, discloses or discusses in any way the nature or content of any discussion held by the jury on which that person served is guilty of an offence and liable, on summary conviction, to a fine of not more than $1,000, or to imprisonment for not more than one month, or to both.

Subsection 32(6) provides:

> A member of a jury for a trial who, before the jury delivers its verdict, discusses with any person other than another juror on the jury or the judge at the trial
>
> (a) any issue or matter raised at the trial;
>
> (b) any evidence adduced at the trial; or
>
> (c) a party to or a witness at the trial;
>
> is in contempt of court.

Subsection 32(7) provides:

> Every person who is interested in any action or issue [that] has been entered for trial by jury and every barrister, counsel, or agent for any person interested in the action or issue, who, before or during the trial, knowingly, directly or indirectly, speaks to or discusses with any person who has been summoned to attend the court to act as a juror at the sitting of the court at which the trial is to be held concerning
>
> (a) any matter or issue raised or that might be raised at the trial;

(b) any evidence adduced or that may be adduced at the trial; or

(c) any party to or witness at the trial or any person who may be a witness at the trial

is in contempt of court.

Subsection 32(8) provides:

Subsection (7) does not apply

(a) if the person summoned to serve as a juror has been disqualified or exempted from serving; or

(b) after the jury for the trial has been selected and the person summoned has not been selected as a member of the jury.