1979 CarswellMan 128, [1980] 1 W.W.R. 504, (sub nom. F.P. Publications (Western) Ltd. Re; R. v. Kerr) 2 Man. R. (2d) 1, 51 C.C.C. (2d) 110, 108 D.L.R. (3d) 153

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F.P. Publications (Western) Ltd. v. R.

F. P. PUBLICATIONS (WESTERN) LIMITED v. **CONNER** PROV.J.

Manitoba Court of Appeal

Freedman C.J.M., Hall, Monnin, Matas and Huband JJ.A.

Judgment: October 26, 1979

Counsel: *K.B. Foster*, for appellant.

W.W. Morton, Q.C., for respondent.

Subject: Criminal; Civil Practice and Procedure

Criminal Law --- Pre-trial practice — Public or publication ban order.

Practice --- Trials — Conduct of trial — Exclusion of persons from hearing — Public.

Trials — Powers and duties of trial judge — Provincial Judge not having power to exclude reporter from court.

Criminal law — Trials — Powers and duties of trial judge — Provincial Judge not having power to exclude reporter from court.

On a charge of keeping a common bawdy house the Crown called as witnesses former customers of massage parlours to testify as to what services, besides massage, were provided. The hearing was conducted in open court, and the applicant's newspaper published the names of the witnesses. The Crown asked the newspaper not to publish names of additional witnesses as it had received information that it would have difficulty in obtaining testimony if names were to be published. The newspaper refused and the Crown applied for and was granted an order under s. 442(1) of the Criminal Code to have the newspaper's reporters excluded while the additional witnesses were testifying. The applicant applied for prohibition to quash the exclusion order.

The application was refused on the grounds that the judge had acted within his jurisdiction to exercise his discretion to exclude reporters where he feared the administration of justice might be seriously affected. The newspaper appealed.

Held:

1979 CarswellMan 128, [1980] 1 W.W.R. 504, (sub nom. F.P. Publications (Western) Ltd. Re; R. v. Kerr) 2 Man. R. (2d) 1, 51 C.C.C. (2d) 110, 108 D.L.R. (3d) 153

The appeal was allowed (Monnin J.A. dissenting).

The exclusion of the reporter was designed to prevent the newspaper from reporting the names of witnesses; it therefore interfered with the freedom of the newspaper to report what it deemed newsworthy. The judge misused his discretion under s. 442(1) and acted in excess of his jurisdiction.

Cases considered:

Baker v. Bethnal Green Corpn., [1945] 1 All E.R. 135 (C.A.) — *referred to*

Daubney v. Cooper (1829), 10 B. & C. 237, 109 E.R. 438 — *referred to*

R. v. Liverpool Corpn. — *referred to*

Ex parte Liverpool Taxi Fleet Operators' Assn., [1972] 2 Q.B. 299, [1972] 2 All E.R. 589 (C.A.) — *referred to*

McPherson v. McPherson, [1936] A.C. 177, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321 (P.C.) — *considered*

R. v. Brown, [1970] 3 C.C.C. 30 (Que. C.A.) — *considered*

Scott v. Scott, [1913] A.C. 417 (H.L.) — *considered*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1(*f*).

Criminal Code, R.S.C. 1970, c. C-34, ss. 442(1), (3) [both re-en. 1974-75-76, c. 93, s. 44], 467.

Authorities considered:

Holmes, Expansion of the Common Law, 1904, p. 32.McWilliams on Evidence, p. 7.Tremeear's Criminal Code, 6th ed., p. 691.

Appeal from the decision of Solomon J., [1980] 1 W.W.R. 62, 1 Man. R. (2d) 175.

Freedman C.J.M. **(Hall J.A. concurring)::**

1 This appeal concerns the question of trial in open court, the power of a presiding judge to depart from such mode of trial, and the correctness or incorrectness of his departure in the present case.

2 **Conner** Prov. J. was presiding over a trial of one Kerr on a charge of keeping a common bawdy house. The alleged offence took place in the setting of what is commonly known as a massage parlour. The accused was licensed to operate such a parlour. If patrons of this enterprize received a massage and nothing more, there would have been no prosecution. But the Crown alleged that in many cases patrons received much more than a massage; indeed that what they received was enough to qualify the premises as a common bawdy house. Exactly what the patrons did receive became the vital issue in the case. Some patrons were called by the Crown to testify on that issue. Four such patrons testified at the hearing held on 22nd August 1979. Their evidence, which supported the bawdy house charge, was reported in both the Winnipeg Tribune and the **Winnipeg Free Press**, but with one important difference. The Tribune did not publish the names of these patrons; the Free Press did. The publication of these names by the Free Press was

1979 CarswellMan 128, [1980] 1 W.W.R. 504, (sub nom. F.P. Publications (Western) Ltd. Re; R. v. Kerr) 2 Man. R. (2d) 1, 51 C.C.C. (2d) 110, 108 D.L.R. (3d) 153

the genesis of the controversy now facing us on this appeal.

3 Crown counsel made an application to **Conner** Prov. J. for an order under the provisions of s. 442(1) [re-en. 1974-75-76, c. 93, s. 44] of the Criminal Code, R.S.C. 1970, c. C-34. That section reads in part as follows:

> 442.(1) Any proceedings against an accused ... 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 members of the public from the court room for all or part of the proceedings, he may so order.

4 Crown counsel stressed that by reason of the nature of the evidence given by the four patrons the publication of their names resulted in great embarrassment to them, particularly to two of them, one a married man, the other a man with a religious affiliation (this was not further clarified) that evidently frowned on conduct such as disclosed in the evidence. The application, however, did not rest on the embarrassment to the witnesses. It was based rather on what was likely to flow from such embarrassment, namely, a reluctance on the part of some patrons who were still to testify to speak fully and candidly on what had occurred at the massage parlour, as well as a reluctance on the part of potential witnesses in future cases similar in nature either to come forward or to tell all they knew. Such a consequence, Crown counsel argued, could well impede the proper administration of justice.

5 Here it may be noted that of the three grounds on which, under s. 442(1), the presiding judge may make an order excluding all or any members of the public from the courtroom, only the third ground — "the proper administration of justice" — is relevant in the present case. That has been common ground between counsel both in this court and in the courts below.

6 The material before us indicates that before any of the four patrons had given their testimony Crown counsel had spoken to the Free Press reporter, requesting that the Free Press should not publish their names. The reporter replied that he would have to consult his superiors about the matter. This he did and thereafter, but before any of these four patrons had been called to testify, he informed Crown counsel that his request would not be agreed to. In short, the Free Press asserted a right to publish the names as part of its report on the court proceedings.

7 Crown counsel's application to **Conner** Prov. J. was for an order either excluding the public as a whole or excluding the Free Press reporter from the trial during the testimony of patron witnesses. It was the second of the two requests which the learned trial judge accepted. He made an order in these words:

> I therefore order that any reporter from the **Winnipeg Free Press** who is present in court for the purpose of reporting this trial be excluded from the courtroom during the next witness's evidence. (The next witness was a patron of the massage parlour.)

8 Following the order of the learned trial judge counsel for the Free Press requested that the trial be adjourned to enable that newspaper to challenge the validity of the order. After hearing some further evidence the matter was adjourned. We are told that it is to be resumed on 29th October. In the interval the Free Press applied in the Court of Queen's Bench for an order quashing **Conner** Prov. J.'s order and for an order prohibiting that learned judge from taking any further proceedings in the matter without a reporter from the Free Press being entitled to be present. That application came on for hearing before Solomon J. [1980] 1 W.W.R. 62, 1 Man. R. (2d) 175]. He reached the conclusion that **Conner** Prov. J. had jurisdiction to make the order in question, that the order was one within his lawful discretion to make, and that the Court of Queen's Bench should not disturb such a discretionary order. He accordingly dismissed the application of the Free Press. This is an appeal from Solomon J.'s decision.

9 To assess the validity of the order made by the Provincial Judge a proper starting point is the recognition that the Free Press had done nothing that was wrongful. The publication of names of witnesses is something that is routinely

done as part of the process of covering a trial. Publicity is the hallmark of justice, and trial in open court is the instrument through which publicity is effectively attained. Closed courts and secret trials bring back memories of the Court of Star Chamber, whose activities cast a dark stain on English law that was not either easily or quickly erased. No one wants a repetition of that or of anything tending towards that. Admittedly what the Free Press did in this case involved a matter of policy on which two opposing views could be held. The Tribune held one view, the Free Press the other view. It is not required of the court to say which view it prefers. It is enough to say that what the Free Press did was not wrongful. This is not a case of a spectator in court suddenly becoming obstreperous or of a litigant hurling insults at the judge. Such conduct can readily be identified as inimical to the maintenance of order or the proper administration of justice. But the publication of the names of the patron witnesses is not of that character at all.

10 In making his order the learned trial judge expressly disclaimed any intent "to interfere with the freedom of the press to report what it deems newsworthy". But that surely was the effect of his order. The very unusual step of excluding from the courtroom the Free Press reporter was designed to prevent that newspaper from reporting the names of the patron witnesses. It therefore interfered with the freedom of the Free Press to report what it deemed newsworthy. Unless an order of that kind is warranted by the terms of the statute — in this case s. 442(1) of the Criminal Code — it should not stand.

11 In my view it was a misuse of s. 442(1) to prevent conduct that was not wrongful and that was an expression of freedom of the press on the theory that its prevention was required for the proper administration of justice. Stronger grounds than here emerge are required to warrant a departure from the principle of trial in open court. In misusing the section the learned trial judge acted in excess of jurisdiction and his order so made cannot stand. The appeal is accordingly allowed and the order in question is quashed.

Monnin J.A. (dissenting):

12 For the reasons given by Solomon J. [[1980] 1 W.W.R. 62, 1 Man. R. (2d) 175], I would dismiss the appeal.

Matas J.A.:

13 I concur with my Lord the Chief Justice but wish to add these comments.

14 The Crown did not challenge the status on the motion of F.P. Publications (Western) Limited, publisher of the **Winnipeg Free Press**. The applicant has the right to contest the order of **Conner** Prov. J. and to appeal from the decision of Solomon J. [[1980] 1 W.W.R. 62, 1 Man. R. (2d) 175] denying its motion to quash: *R. v. Liverpool Corpn.; Ex parte Liverpool Taxi Fleet Operators' Assn.*, [1972] 2 Q.B. 299, [1972] 2 All E.R. 589 (C.A.).

15 The respondent was not represented on the appeal. At the trial, his counsel made a submission to the learned trial judge which, while not in actual opposition to the Crown motion, referred the court to the comment in McWilliams on Evidence, at p. 7, with respect to the importance of the proper administration of justice, and went on to refer to the dictum of Lord Atkinson in *Scott v. Scott*, [1913] A.C. 417 at 463 (H.L.), on the corresponding importance of public trials. Lord Atkinson said:

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

16 With respect to the intent of the order made by **Conner** Prov. J., it is my view that the order is designed, albeit in a roundabout way, to preclude the newspaper from publishing names of witnesses. In enacting s. 442(1) [re-en.

1979 CarswellMan 128, [1980] 1 W.W.R. 504, (sub nom. F.P. Publications (Western) Ltd. Re; R. v. Kerr) 2 Man. R. (2d) 1, 51 C.C.C. (2d) 110, 108 D.L.R. (3d) 153

1974-75-76, c. 93, s. 44] of the Criminal Code, R.S.C. 1970, c. C-34, Parliament did not give specific authority to a judge to ban publication of witnesses' names as Parliament has done elsewhere in the Code, for example, ss. 442(3) [re-en. 1974-75-76, c. 93, s. 44] and 467.

17 The learned trial judge, at the conclusion of his oral judgment, said:

> I would also add that I do not mean to interfere with the freedom of the press to report what it deems newsworthy, nor am I using my authority to indirectly censor newspaper articles. That is not my intention, nor should this order be so interpreted. I have made the order solely on the basis that there is a likelihood that there may be an interference with the proper administration of justice.
>
> Finally, I do not by this order intend to interfere with the editorial policy or management of the **Winnipeg Free Press**. That newspaper's policy is its own to set. However, where that policy may interfere with the proper administration of justice it is the duty of this court to remove that interference and to ensure the proper administration of justice.

18 Those comments were referred to by Solomon J. in his reasons for judgment (p. 65) to support his opinion that the learned trial judge did not purport, by his order of exclusion, to interfere with the applicant's publication or editorial policies, or freedom of the press.

19 But at the hearing before us, counsel for the Crown agreed that the intent of the original motion of the Crown was to prevent publication of names of witnesses by the newspaper. There can be no doubt that in acceding to the request of the Crown for the order the court brought about the effect which had been intended by the Crown. This became quite clear when the reporter was told that he could remain in the courtroom as a private citizen member of the public but not as a reporter when the evidence of the witnesses in question was being given. In my respectful view, it is unrealistic to say, as suggested by Crown counsel, that the question before us is not one of equating the order with a ban on the publishing of names. It is on the basis of a ban that the exercise of the learned trial judge's discretion must be considered.

20 The procedure adopted by the applicant to quash the order was correct. It challenged the order of exclusion immediately and applied to the Court of Queen's Bench for an order to quash when its submission to the learned trial judge was rejected. In accepting the spirit of the order and proceeding in that fashion, rather than defying the clear intent of the order and inviting further proceedings by the Crown and the learned trial judge against it or others, the applicant behaved responsibly as a law abiding corporate citizen.

21 Section 442(1) of the Criminal Code reads:

> 442.(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 members of the public from the court room for all or part of the proceedings, he may so order.

22 Crown counsel described the section as "far reaching". In Tremeear's Criminal Code, 6th ed., at p. 691, it is categorized as providing for "exceptions to the general rule" requiring openness and publicity in our courts. But although the exceptions have been codified, the long-established principles of the common law in favour, generally, of open trials have not been abrogated: see the judgment of Tremblay C.J.Q., dissenting, in *R. v. Brown*, [1970] 3 C.C.C. 30 at 34 (Qué. C.A.).

23 In *Brown*, the trial judge had accepted the Crown's application for permission to have the evidence of two Crown witnesses heard in the absence of the public but with newspaper reporters present. The request was made on the

basis that both men had criminal records and that revealing their identity would result in disclosing that information in a detrimental way. The names, addresses and occupations of the witnesses were ordered withheld from the jury and the newspapers. The names and criminal records were secretly revealed to the judge, the accused and his counsel. Tremblay C.J.Q., after referring to *Daubney v. Cooper* (1829), 10 B. & C. 237 at 240-41, 109 E.R. 438, *Scott v. Scott*, supra, and *Baker v. Bethnal Green Corpn.*, [1945] 1 All E.R. 135 (C.A.), and quoting from Sir Frederick Pollock, adopting a thought of Judge Holmes in Expansion of the Common Law, 1904, p. 32, that "publicity in the administration of the law is on the whole — ... worth more to society than it costs", said at p. 38:

> It is in this context that one must interpret *Cr. Code*, s. 428. Parliament has laid down the rule that trials must be held in open Court. This rule must be jealously and scrupulously followed. There is no doubt that the section admits of certain exceptions based on the public interest: public morals, maintenance of order, administration of justice. These exceptions must be narrowly construed and cannot be used to justify transgression of the rule by reason of private interest, compassion or convenience.

24 I respectfully adopt that comment.

25 Of particular applicability to the case at bar are the remarks of Lord Shaw in *Scott*, where the learned law lord said at pp. 477-78:

> I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary — and they appear to me still to demand of it — a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.

26 It is my view that, in the case at bar, the Crown did not show (to use the words of Lord Greene M.R. in *Baker*, supra) "the most solid reasons" for applying for the grant of the order by **Conner** Prov. J. I am of the view that the discretion of the learned trial judge was not exercised judicially and that the order must be quashed.

27 A second branch of the applicant's motion was for an order of prohibition, prohibiting the learned trial judge from taking any further proceedings without a reporter from the **Winnipeg Free Press** being entitled to be present. The Crown argued that the remedy of prohibition was not available to the applicant. In my view, we do not need to consider this point. I do not think an order of prohibition is necessary. In the result, I concur in the allowance of the appeal and the quashing of the order of **Conner** Prov. J.

Huband J.A.:

28 I have had the opportunity of considering the reasons for judgment of the chief justice. I agree with his comments, and I agree with his disposition of the appeal. I wish to add some additional observations of my own.

29 The order made by **Conner** Prov. J. to exclude a reporter from the **Winnipeg Free Press** from a courtroom during the course of a trial is contrary to the concept of the open courtroom and of a free press. I have no doubt that the order was made with the best of intentions, in what **Conner** Prov. J. thought to be in the interests of the administration of justice, but the result of such an order is to erode public confidence in the criminal justice system and, ultimately, to damage the administration of justice.

30 I start with the proposition that trials, both civil and criminal, should be open to the public. That means more

than allowing people to attend in person. People must be free to talk and to write of what they see and hear. The concept of an open courtroom is, if anything, more important in criminal trials where the liberty of the subject is in jeopardy than in civil disputes.

31 The common law which we inherited from England made certain exceptions to the concept of openness. The subject matter was dealt with by the House of Lords in *Scott v. Scott*, [1913] A.C. 417 (H.L.), in which the law lords expressed the view, in unanimous terms, that save for a few minor exceptions, the courtrooms must be open to the public. The judgment of the Earl of Halsbury starts with this general proposition (at p. 440): "I am of opinion that every Court of justice is open to every subject of the King."

32 The judgment of Lord Halsbury concedes that England inherited, through the ecclesiastical courts, a heritage of "in camera" hearings, but that practice had been truncated no later than 1857. From that point onward, the only exceptions to the broad proposition stated by the Earl of Halsbury were with reference to actions involving trade secrets, matters involving relationship between guardians and their wards, or questions concerning the care and treatment of lunatics. The latter two subject areas were matters which he felt should be outside the realm of "the public administration of justice".

33 It is instructive that in the case of *Scott v. Scott* the issue was whether a contempt of court had been committed by a person for publishing what had occurred during a nullity proceeding between a husband and wife where, with the consent of all parties, an order had been made that the proceedings be held in camera. The unanimous judgment of the law lords was that the private hearing was improper (and therefore the publication of what had occurred could not constitute contempt). Without diminishing the importance of public trials in civil matters, how much more important it is that criminal proceedings be open to public scrutiny?

34 If the principle of public trials is to be limited or curtailed, it must be done in clear terms by statutory pronouncement.

35 Section 442(1) [re-en. 1974-75-76, c. 93, s. 44], of the Criminal Code, R.S.C. 1970, c. C-34, does, in fact, grant a judicial discretion to exclude all or any members of the public from the courtroom under three circumstances — where the court is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to make such an order. It is under the last category that **Conner** Prov. J. purported to exclude a reporter for the **Winnipeg Free Press**.

36 The order was granted on the application of Crown counsel in order that prospective witnesses to an ongoing criminal trial should not be inhibited from attending and giving their evidence by the prospect that the import of their testimony, together with their names, would appear in a daily newspaper. The criminal trial involves charges against one Ken Kerr of keeping a common bawdy house. On the first day of trial, the Crown called four male witnesses who had attended at a massage parlour. Each of the men testified as to the services to which they had availed themselves at the massage parlour. The Winnipeg Tribune published the story inherent in this testimony, but did not publish the names of witnesses. The **Winnipeg Free Press**, however, published names as well as stories. No doubt this caused embarrassment and discomfort for the witnesses in question. It was at this stage that Crown counsel launched a motion to exclude the Free Press reporter. The Crown contemplated calling at least one or two further customers of the massage parlour, and the Crown wanted to give the best possible assurances to these witnesses that their names would not be revealed in leading newspaper stories.

37 I agree with the submission of counsel for F.P. Publications (Western) Limited that the order may be in the interests of the prosecution, but it is not in the interests of the administration of justice. On the contrary, I think it is defiantly against the interests of the administration of justice.

38 There is nothing unusual about reluctant witnesses. There are enormous numbers of witnesses in both civil and

criminal disputes who find it embarrassing, inconvenient, damaging, even dangerous, to testify. Yet there are few known cases where the court has protected a witness from such hazards by clothing the witness with the anonymity of a closed courtroom. I gather that the potential witnesses who might be shielded by the order are adult males who have apparently availed themselves of certain services in what is alleged to be a common bawdy house. I have difficulty in understanding why the time-honoured concept of an open trial should come crashing to the ground to convenience such witnesses, particularly when their evidence can surely be obtained without the necessity of the order in question.

39 The witnesses in question are under subpoena. When called as witnesses they will take an oath to tell the truth, and presumably they will do so. They can be required to answer proper questions put to them. If they prove unco-operative, under certain circumstances they can be declared hostile. If false testimony is given, charges of mischief or, indeed, perjury can be laid against them, depending upon the circumstances. A party to a civil or criminal litigation is not without tools to ensure that witnesses attend and tell the truth, regardless of their personal discomfort. Thousands have testified with trepidation and reluctance before, and I see no need to depart from the fundamental concept of an open court in this case. It was not that long ago when the only ground under which a divorce could be obtained was that of adultery. There were countless people who found themselves in compromising situations but who were required to testify as to where they were and what they were doing in spite of the risk that the revelations in a public courtroom might imperil a marriage or jeopardize employment. I do not think the kind of problem which confronts the Crown in this case is abnormal. It is a problem to be confronted within the context of the adversary system. The court should not invoke discretionary powers which would erode the common law principle of an open courtroom for the purpose of helping the Crown in the prosecution and presentation of its case.

40 It is urged that the order of **Conner** Prov. J. applies to only one man — the reporter for the **Winnipeg Free Press**. Otherwise, the courtroom remains open to the public in general and to other members of the news media who are willing to act in what the Crown considers to be a more responsible manner, and not to publish the names of witnesses. That other members of the public are welcome to attend the proceedings is no answer. In the judgment of the Privy Council in *McPherson v. McPherson*, [1936] A.C. 177, [1936] 1 W.W.R. 33 at 40, [1936] 1 D.L.R. 321, Lord Blanesburgh states that the rule of open courtrooms means that "the Court must be open to *any* who may present themselves for admission."

41 It would make a mockery of the rule if "some" or "a selected few" were substituted for "any". I gather that in the recent trial of a Russian dissident, Shcharansky, some people were admitted to the courtroom, but clearly the court was not open to "any who may present themselves for admission".

42 The ultimate extension of the initial order granted by **Conner** Prov. J. leads to a trial before a selected audience which is present subject to an undertaking of silence, or to a totally closed courtroom. The order granted by **Conner** Prov. J. bars a reporter for the **Winnipeg Free Press**, but it does not and cannot purport to prevent the newspaper from lawfully publishing the names of the witnesses and the stories they present. The order simply makes it more difficult for the **Winnipeg Free Press** to obtain that information. But suppose the **Winnipeg Free Press** is able to obtain the information by acquiring it from the Winnipeg Tribune or from some spectator who is not one of its reporters? In order to achieve the result intended by the court, there would then have to be further orders until ultimately the only people who would be allowed to be present would be those who had agreed not to talk. To sanction a step in the direction of a closed courtroom is dangerous. In the next case, it might be the gossip of spectators which inhibits a potential witness. On the basis of the order of **Conner** Prov. J., it would be open to the court to clear the spectators out.

43 I do not believe that the discretionary power under s. 442(1) of the Code was intended to be used to impose silence. In the guise of ordering a person or persons out of a courtroom, the order of **Conner** Prov. J. would impose a form of censorship, in defiance of the constitutional protection of freedom of the press contained in s. 1(*f*) of the Canadian Bill of Rights, R.S.C. 1970, App. III. I think that the learned Provincial Judge was using a section of the Code intended to deal with the physical presence of a person or persons in order to achieve a different result. In fact, the physical presence of the reporter was not objectionable. 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. Since it was never intended that s. 442(1) be used as a mechanism of censorship, and since that was the sole purpose of the order made, I am driven to the conclusion that the order must be quashed.

Appeal allowed. *; Appeal allowed.*

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