

Official Secrets Act

benefit of the public, the spectators were removed from the courtroom for approximately 15 minutes while this evidence was adduced. After that sensitive technical information was established, the public and the press were allowed to return to the courtroom. Only under special circumstances should that be done.

I should like to refer to some of the most important cases historically regarding this matter, such as the Scott versus Scott case which was heard by the Privy Council of the House of Lords. At that time Viscount Haldane is reported as saying the following:

In cases in other courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator.

In other words, it cannot be done if he stays on as a judge. He continued as follows:

... in the final reasons for his judgment, on the ground that justice could not be done in the particular case before him if it were not heard in camera.

He was discussing a case where counsel wanted a portion of it held in secrecy. He continued:

My Lords, provided that the principle is applied with great care and is not stretched to cases where there is not a strict necessity for invoking it, I do not dissent from this view of the existing law.

He expressed the existing law as follows:

While the broad principle is that the courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done.

In other words, no matter what one may have to bear in front of the public's eye, it has to be done, because under common law a secret trial or portions thereof can be conducted only if it is for the protection of certain individuals and their rights. This matter dealt with immoral conduct involving children and lunatics. In order to provide a witness with some protection from being shot, for example, and in order for justice to be done, the request was made.

Viscount Haldane continued as follows:

But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.

The paramount consideration is that justice must be done. He continued:

The latter must treat it as one of principle, and as turning, not on convenience, but on necessity

In either case he must satisfy the court that by nothing short of the exclusion of the public can justice be done...

A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands.

That common law principle was expanded and relied upon in the case of Rex versus Lewes Prison (Governor), Doyle, ex parte. The case involved a court martial which was held in secrecy in Dublin in 1914. That was because martial law was in existence at the time. Dublin was under martial law because the IRA were in revolt. There was concern that the courtroom might be blown up, or at least that witnesses would have been

[Mr. Dick.]

shot either in the courtroom or in retaliation afterward. In order for justice to be done, it was necessary to conduct the trial in secrecy. Otherwise the trial could not have been carried out.

The Acting Speaker (Mr. Ethier): Order, please. I regret to interrupt the hon. member but his allotted time has expired. He may continue with the unanimous consent of the House. Is there unanimous consent?

Some hon. Members: Agreed.

Mr. Dick: Thank you, Mr. Speaker. In conclusion, I should like to point out that nowhere can I find in civil cases, criminal cases or cases conducted under the Official Secrets Act in Canada, an example of a total trial being held in secrecy. Applications for exclusion have been made only for sensitive parts.

In the Treu case, upon the charge being read and the plea being entered, an application was made and secrecy was invoked *carte blanche* for the entire trial. It is unfortunate that not even the reasons for doing so were given publicly.

In the Tomasz Biernacki case, the accused was a hydraulic engineer. In his case, much of the evidence at the preliminary hearing was heard in public; but from time to time the judge ordered journalists present not to publish certain pieces of information involving national security matters. That was because the Official Secrets Act indicated that all or any portion of the public may be excluded. In other words, the judge may order average citizens out of the courtroom, at the same time as telling press reporters that they can remain. For example, the judge could order that all women have to leave the courtroom but that the men are allowed to remain, or vice versa. In the Biernacki case most of the evidence was heard in public.

In the 1967 Featherstone case, most of the evidence was heard in public; but the judge excluded reporters and spectators from the courtroom to protect the identity of undercover RCMP agents. The judge authorized the official court reporter to make available a transcript of the closed door testimony, provided the agents were not identified. Even though it was necessary to protect certain elements of secrecy, they went to extremes to make it as public as possible. "Public" means an open and public courtroom.

I should like to refer to the case of Mr. Treu and an article which appeared in the April 29 edition of the *Globe and Mail*. It was written by a Mr. Jeff Sallot and reads as follows:

RCMP Sergeant D. R. McElroy, one of the investigators, told reporters there were "entire days of evidence" that didn't concern classified material.

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Why was the public not there? The article continues as follows:

But it was better not to have the public present because there was no way of determining in advance if questions by the defence would get into national security areas.